No. 94-1456

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

DANIEL GRISET; GRISET CAMPAIGN COMMITTEE;
SANTA ANA PROGRESS COMMITTEE,
Petitioners,
vs.
FAIR POLITICAL PRACTICES COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

PETITIONERS' REPLY BRIEF

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Petitioners submit this Reply to correct any erroneous impression of the facts or the legal issues in this case that may otherwise be given by Respondent's Brief in Opposition (cited herein as "Resp. Brief").

I

Respondent's characterization of the mailers that were sent by Petitioners, and which gave rise to this case, as " 'smear' or 'hit' pieces" (Resp. Brief, p. 2) has no support in the record below, even though in quotation marks in Respondent's Brief, and is in fact erroneous. Neither that characterization nor any similar unfavorable characterization was given to the mailers by the California Supreme Court (Petitioner's Appendix A), by the California Court of Appeal (Pet. App. B), by the trial court (Pet. Apps. C, D), by Respondent Fair Political Practices Commission itself in its Decision (Pet. App. E), by the administrative law judge in his Proposed

Decision (also Pet. App. E), or by Respondent itself in its Accusation that initiated the administrative hearing (not included in the Appendices). To the contrary, the dissent in the Court of Appeal stated that "the mailers under consideration here, which effusively praise Griset and harshly criticize his opponent, are relatively tame." (Pet. App., p. B 16, which also further describes the mailers.) The unsupported pejorative characterization given to the mailers by Respondent should not give this Court the impression that the political speech in this case may have been scurrilous or untrue and outside the scope of the protection of the First Amendment. The issue here — as it was in the courts below — is not the merit of the speech in the mailers, but whether protected political speech may constitutionally be required to include the identity of the speaker.

II

Respondent's characterization of the statute in issue in this case, California Government Code § 84305, as "narrowly tailored" (Resp. Brief, p. 5) is illusory. The statute's application "only" to candidates and political committees is neither a significant limitation in practice nor a limitation that saves it from unconstitutionality. It is not narrow in practice because "committee" includes not only candidates and their campaign committees, but any person who spends $1,000 or more to express that person's views on the election of a candidate or passage of a ballot measure. (See Cal. Gov. Code § 82013, Pet. App. F; and Petition pp. 9-10.) No matter how Respondent describes the statute, it applies to speech directed to voters concerning the election of candidates and passage of ballot measures.

Section 84305's application "only" to mass mailings of candidates and political committees likewise is neither a narrowing that is significant in practice nor one that saves the statute from unconstitutionality. "Mass

mailings" are mailings of more than two hundred pieces of mail (Cal. Gov. Code § 82041.5, Pet. App. F), such a low threshold that it includes virtually all mailers that would be large enough in quantity to have an impact. Section 84305 in fact covers the principal means of communication to voters in state and local campaigns. (See the dissent in the California Court of Appeal, Pet. App., p. B 13, explaining why "political campaigns in southern California must be conducted primarily by mail.")

Respondent's characterization of § 84305 as having a narrow application simply emphasizes its application to political expression — speech that is at the heart of the protections of the First Amendment.

III

Respondent erroneously contends that the question decided by the California Supreme Court — whether " 'a statute that prohibits anonymous mass mailings by candidates or candidate-controlled committees in political campaigns violates the First Amendment' " — is not included in the "Questions Presented" by Petitioners. (Resp. Brief, pp. 5-7.) To the contrary, that question is included in Petitioners' question number 1 — whether the statute is unconstitutional on its face, that is, in any application — and that question is precisely presented in question number 2 — whether the statute is "unconstitutional under the First Amendment as applied to candidates and their campaign committees."

IV

Respondent's inference that review of the constitutional issues in this case is somehow inhibited by the nature of the appeal from the trial court's denial of a petition for a writ of administrative mandamus is erroneous. (Resp. Brief, p. 7.)

Respondent does not provide any support for this inference, and it is not supported by the record in the courts below. The unconstitutionality of § 84305 under the First Amendment was the sole basis for Petitioners' challenge in the trial court to the fine imposed by Respondent. The trial court denied Petitioners the relief they sought, finding that the statute was constitutional as applied to candidates and their campaign committees (including Petitioners), and saving the statute from what it perceived as its unconstitutional overbreadth in its application to other persons by construing the statute as applying only to candidates and their campaign committees. (Trial court's Minute Order, Pet. App. D.) The Court of Appeal upheld the trial court on both aspects of its ruling (Pet. App. B). The California Supreme Court upheld the statute as applied to candidates and their campaign committees, but declined to consider the overbreadth issue (Pet. App., p. A 3).

Along the same lines, Respondent also says that "Petitioners have abandoned the mundane issue whether the administrative fine levied against them was legal, for the bright lights of a constitutional facial challenge." (Resp. Brief, p. 6.) Since the facts of this case were stipulated to, and the "bright light" of a constitutional challenge was the only issue in the trial court proceeding, there were no other issues, mundane or not.

Respondent has not previously raised this argument concerning the procedural posture of the case, and no lower court has considered the procedural posture of the case as limiting review of the constitutional issue. The constitutional issue is squarely presented in this case, uncomplicated by any other issues of state law applicable to the case.

V

Respondent is correct, however, in suggesting that this Court might make a "sweeping pronouncement" in the pending *McIntyre* case (*McIntyre v. Ohio Elections Commission*, 67 Ohio St.3d 391 (618 N.E.2d 152) (1993), *cert. granted*, 114 S.Ct. 1047 (1994, No. 93-986)) that would invalidate any speaker identification requirement applicable to political speech, including § 84305. (Resp. Brief, p. 8.) That possibility, however, is not grounds for denial of certiorari in this case, as Respondent suggests, but instead would permit this Court to deal with the unconstitutionality of § 84305 by granting certiorari and either summarily reversing the decision by the California Supreme Court, or by remanding the case to the California Supreme Court to reconsider its decision in light of such a decision in *McIntyre*.

Petitioners again respectfully urge this Court to grant their petition for a writ of certiorari.

DATED: April 7, 1995.

Respectfully submitted,

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REED & DAVIDSON

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